[UNPUBLISHED ORDER]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	CASE NO. 01-16367-BKC-RAM
	CHAPTER 7
AEROFLORAL,	
Debtor.	

ORDER GRANTING RADIO SHACK CORPORATION'S REQUEST FOR PAYMENT OF ADMINISTRATIVE RENT FOR TIME PRIOR TO ABANDONMENT

Radio Shack Corporation (the "Landlord") owns certain commercial warehouse space (the "Premises") which it leased (the "Lease") to the Debtor prior to the filing of this case. In its Request for Payment of Administrative Rent for the Time Prior to Abandonment (the "Request for Payment") filed on November 26, 2001, the Landlord seeks the payment of rent as a chapter 7 administrative expense for the postpetition period running from the date of the conversion of the case to chapter 7, which occurred post-rejection of the Lease, through the date on which the chapter 7 trustee (the "Trustee") was compelled to abandon equipment stored on the Premises. The Trustee opposes the Request for Payment for two reasons. First, the Trustee argues that the estate's occupancy of the Premises solely for storage of the Debtor's assets did not constitute use nor provide benefit to the bankruptcy estate. Second, the Trustee argues that even if an actual benefit was provided to the estate, the Trustee's actual use was limited to 5-10% of the total square footage of the Premises and the claim of rent should be reduced accordingly.

On December 20, 2001, the Court held a hearing on the Request for Payment. At the close

of the hearing, the Court invited the parties to submit supplemental memoranda of law. The Landlord filed a memoranda of law on January 11, 2002 and the Trustee chose to rely on the arguments presented at the December 20, 2001 hearing and those contained in the Trustee's objection to the Request for Payment filed on December 18, 2001. After reviewing the pleadings, the Court file, relevant case law and hearing the arguments of the parties, the Court finds that the Request for Payment should be granted. The Trustee's arguments are rejected and the Landlord is awarded an allowed chapter 7 administrative expense in the amount of $145,427.64.

FACTUAL AND PROCEDURAL BACKGROUND

The legally pertinent fact are undisputed. The Debtor commenced this case by filing a petition for relief under chapter 11 on June 13, 2001 (the "Petition Date"). The Lease was rejected by the Debtor pursuant to 11 U.S.C. §365 of the Bankruptcy Code on August 8, 2001 (the "Rejection Date"). On August 15, 2001 (the "Conversion Date") this bankruptcy case was converted from a case under chapter 11 to one under chapter 7. Significant, however, is that estate personal property continued to occupy the Premises through September 26, 2001 (the "Abandonment Date"). The Request for Payment covers the rent due for the 42 days between the Conversion Date and the Abandonment Date (the "42 Days").

Prepetition, the Debtor utilized the Premises as a refrigerated warehouse for the storage of flowers. During the 42 Days, the Debtor's personal property remaining on the Premises consisted primarily of the refrigeration equipment and associated panels which joined together to create a large refrigeration box (the "Ice Box"). During the 42 Days, the Trustee was not operating the cold storage business and therefore the Ice Box was turned off and sat idle. The Ice Box physically took up between 90-95% of the Premises. However, it did so in the form of an empty shell of four

temporary walls within the hard walls of the Premises, or, stated more simply, a "box within a box". Accordingly, notwithstanding the presence of the Ice Box on the Premises, the inside of the Ice Box was an open air area of presumably between 80-90% of the total square footage. One issue before the Court is whether the "inside" of the Ice Box should be treated as part of the estate's property stored on the Premises.

DISCUSSION

A. Arguments of the Parties

The Trustee makes a two tiered argument in opposition to the request for payment. First, he states that storage of the Ice Box on the Premises during the 42 Days only provided a potential benefit to the Debtor's estate, which is insufficient to satisfy the requirements of §503(b)(1)(A). Further, the Trustee argues that even if an administrative expense for the rent is appropriate, the total amount of the rent should be limited to 5-10% of the total square footage of the Premises. The Trustee reasons that (1) the internal area was not used post-rejection, and (2) the air and space within the Ice Box was available for the storage of items or for re-letting to other tenants.

The Landlord argues that the presence of the Ice Box on the Premises provided actual benefit to the estate in the form of storage and protection for its personal property. Moreover, although there was a large open air area inside the physical dimensions of the Ice Box, this internal area was not a marketable commercial premises. Additionally, the Landlord asserts that the Ice Box does not encompass just the square footage of the walls; logically and practically it must also include the space inside the walls.

B. Section 503(b)(1) Governs the Nonresidential Real Property Lease for the Post-RejectionPeriod

The Court's legal analysis begins with (and quickly moves on from) 11 U.S.C. §365(d)(3), which generally governs the applicability of debtor obligations under commercial leases, providing in relevant part that "[t]he trustee shall timely perform all of the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. §365(d)(3). As expressly stated in this provision, it is limited to leases which remain subject to §365(d)(3), (i.e. those that have not been rejected by the debtor). See In re Florida Lifestyle Apparel, Inc., 221 B.R. 897 (Bankr. M.D.Fla. 1997); In re Homeowner Outlet Mall Exchange, Inc., 89 B.R. 965, 970 (Bankr. S.D.Fla. 1988).

Since the Request for Payment is for a post-rejection period, it is 11 U.S.C. §503(b)(1) which controls. See In re Laurence R. Smith, Inc., 127 B.R. 715, 717 (Bankr. D.Conn. 1991); In re Patella, 102 B.R. 223, 225 (Bankr. D.N.M. 1989). Section 503(b)(1) allows as administrative expenses "the actual, necessary costs and expenses of preserving the estate." Generally, administrative expense priority is allowed only if the expense provided an actual benefit to the estate. See In re Subscription Televison of Greater Atlanta, 789 F.2d 1530 (11th Cir. 1986); In re Beverage Canners International Corp., et al., 255 B.R. 89 (Bankr. S.D.Fla. 2000). Further, "[s]ection 503 priorities are to be construed narrowly, and the burden of establishing whether an expense is entitled to an administrative priority falls squarely on the movant." Beverage Canners, 255 B.R. at 92 (internal citations omitted).

The analysis of whether "actual benefit" was provided to a debtor is one which varies according to the facts of each case. See Subscription, 789 F.2d at 1532. In Beverage Canners, this

Court considered whether there was benefit to the debtor arising from the undisputed use of certain trademarks. The instant postrejection issue leads the Court to the related question of whether there was actual benefit where the use (for storage) was for a different purpose than the previous business use of the Premises. This Court finds that there was.

C. Storage and Protection of the Debtor's Property Satisfied the Use and Benefit Test of §503(b)(1)(A)

Courts have reached different conclusions in analyzing whether the "use and benefit" test of §503(b)(1)(A) is satisfied where personal property is merely stored on leased premises no longer being operated by the debtor. This Court finds the better reasoned solution to be that protection and storage of the Debtor's personal property does constitute "use" which provided "actual" benefit to the Debtor. See In re F.A.Potts & Co., Inc., 137 B.R. 13 (E.D.Pa. 1992); In re Howe Products, Inc., 125 B.R. 313 (Bankr. M.D.Fla. 1991); In re Grimm & Rothwell, Inc., 108 B.R. 186 (Bankr. S.D.Ohio 1989); Homeowners, 89 B.R. 965; but see In re Mainstream Access, Inc., 134 B.R. 743 (Bankr. S.D.N.Y. 1991) (disallowing administrative expense where stored property was eventually abandoned to the landlord and landlord frustrated the debtor's efforts to remove the property).

In Howe, the debtor occupied certain premises originally pursuant to a valid lease, which eventually ceased to be in effect with the debtor remaining on site as a holdover tenant. See 125 B.R. at 313. The bankruptcy court, under a §503(b)(1)(A) analysis, found "[t]hat there is no doubt that a landlord whose premises have been occupied by the Debtor-in-Possession is authorized under this section to be awarded an administrative expense for the use and occupancy of the premises." Id. at 314. So too in Grimm, where under a similar factual scenario the court found that "the Trustee's use of the warehouse as a storage space was necessary and preserved the assets of the

estate until such assets were eventually sold at auction." 108 B.R. at 190.

In the instant case, the Trustee hoped to sell the Ice Box to generate money for the estate. Indeed, preserving and protecting this significant asset was the very reason for the Trustee to maintain his occupancy of the Premises after discontinuing the Debtor's business operations. The estate derived actual benefit as a result of this use. In the exercise of his discretion, the Trustee decided not to abandon the Ice Box but rather to investigate the validity of Ocean Bank's lien in the hopes of selling the Ice Box and recovering value for the estate. To achieve this purpose, he had the duty to safeguard the assets until the time of sale. Corresponding to that duty is the practical necessity of storage and protection of the property from the elements, theft and other unforseen incidents. Although the opportunity to sell the Ice Box to recover a return to the estate was a "potential" benefit since the sale was contingent, the value of not having to pay alternative storage costs and other fees to protect the property was an "actual" benefit.

Finally, the Court finds that an ultimate recovery to the estate through a sale is not and should not be the test for determining an administrative expense obligation. The fact that the Trustee was unsuccessful in his attempt to sell the Ice Box does not affect the legal analysis as to whether use and benefit was provided to the estate. Cf. Beverage Canners, 255 B.R. at 94 fn.3 ("[I]t is . . . unnecessary for profit to be proven in order for an administrative priority to be warranted for the postpetition use of another's property by a debtor."). To rule otherwise would impermissibly place the risk on landlords when a trustee is deciding whether to store property on leased premises in the hopes of realizing equity from a sale. In the instant case, when the Trustee chose not to abandon the Property and instead continued to occupy the Premises, he knew or should have considered the risk that the administrative rent obligation would exceed any equity the estate had in the Ice Box. In

short, the Landlord's entitlement to administrative rent should not turn on whether the Trustee made the right decision. Choosing to use the Premises carried with it the burden of paying the administrative rent.

In sum, the Court finds that the requirements of §503(b)(1)(A) are satisfied by the Trustee's use and corresponding benefit. The Trustee used the Premises by maintaining estate property on site after the Lease had been rejected, and the estate benefitted in the form of the value of storage and protection. An administrative expense to the Landlord for the value of this use and benefit is appropriate.

D. Valuation of the Use and Benefit

There is a divergence of authority on the reasonable value for the use and occupancy of a landlord's real property. See F.A.Potts, 137 B.R. at 17 (citing cases supporting both lines of reasoning). This Court adopts the position that the appropriate determination of reasonable rent for property is an objective one, and is based on the reasonable rental value of the leased premises for its available use, "without regard for the actual use of the debtor." 2C Bankr. Service L. Ed. §23:697 (2002) (citing cases); see also Kneeland v. American Loan & Trust Co., 136 U.S. 89, 102-03 (1890). The objective approach, as applied to the instant case, makes no distinction between the manner in which the Trustee could have used the Premises and the manner in which the Trustee did actually use the Premises.

Applying this standard, the Court need not consider the fact that the Trustee merely used the Premises for storage of the Ice Box, and must simply investigate the reasonable value of the Premises in its intended use for business operations. See Grimm, 108 B.R. at 90 (absent evidence to the contrary, the fair rental rate is the contract rate rather than a rental rate determined by the

specific use of the premises). This Court has previously ruled, and again finds, that there is a strong presumption in favor of the agreed to contract rate. See Beverage Canners, 255 B.R. at 93; see also In re Cornwall Paper Mills, Co., 169 B.R. 844 (Bankr. D.N.J. 1994). In the instant case, the Court has been presented with no evidence by the Trustee to overcome this presumption, and accordingly, the Lease rate of $105,319.63 per month will control.

E. The Ice Box Encompassed Nearly all of the Property and Thus the Full Lease Amount is Due

The final point argued by the parties calls for a ruling as to the percentage of the Premises utilized by the Trustee during the 42 Days. As set forth above, although the external walls of the Ice Box took up nearly the entire Premises, its "insides" were vacant, thus prompting the Trustee's argument that the Landlord should not receive an administrative expense for the unused portion. The Court rejects the Trustee's position.

The Court has found that storage and protection of the Ice Box is the "use" which gives rise to the administrative expense in the instant case. As the Ice Box stood, completely assembled, it took up an area of between 90-95% of the total square footage of the Premises. It would run contrary to logic and common sense to consider that the area occupied by the estate's personal property is not the area "used" for §503 purposes.

The Ice Box is essentially a huge refrigerator, with walls on the outside keeping the cold air on the inside. What if the leased premises was a mini-warehouse, 8 feet high by 5 feet wide, with a 7 feet high by 3 feet wide refrigerator stored inside by a trustee after rejection of the mini-warehouse lease. Could a trustee credibly argue that the square footage of the air inside the refrigerator could be subtracted from the rented square footage? Further, could it seriously be argued that the landlord would not be entitled to an administrative expense for the entire space

including the one foot above the refrigerator and 2 feet in the width? The Court recognizes that the cooling equipment and walls that constituted the Ice Box are not exactly like a typical refrigerator. Nonetheless, the Court finds that the "inside" of the Ice Box was a part of the personal property stored on the Premises such that virtually the entire Premises was used during the 42 Days. Thus, the Court rules that the full contractual rental amount for the 42 Days is an administrative expense. The monthly Lease rate applied to the 42 Days results in a $145,427.64 allowed administrative expense. Therefore, it is --

ORDERED as follows:

1. The Request for Payment is **GRANTED.**

2. The Landlord is awarded an allowed chapter 7 administrative expense in the amount of $145,427.64.

ORDERED in the Southern District of Florida this 3rd day of June, 2002.

ROBERT A. MARK
Chief United States Bankruptcy Judge